ASSOCIATION OF ADMINISTRATIVE LAW JUDGES
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April 4, 2003

The Honorable Jo Anne B. Barnhart
Commissioner of the Social Security Administration
P.O. Box 17703
Baltimore, MD 21235-7703

Re: **Statement of the Association of Administrative Law Judges in Response to the Notice of Final Rulemaking with Request for Comment – Video Teleconferencing Appearances before SSA Administrative Law Judges, 68 F.R. 5210**

Dear Commissioner,

I write on behalf of the Association of Administration Law Judges ("AALJ"), which represents the Administrative Law Judges ("ALJs") employed by the Social Security Administration ("SSA") and Department of Health and Human Services ("DHHS"). This letter is submitted to comment upon whether claimants should or should not be empowered to veto the use of video teleconferencing ("VTC") to take the testimony of expert witnesses.

When the VTC regulations first were proposed, I commented upon this issue, among others, in my letter dated February 28, 2001. I attached to my letter the January 29, 2001, report by Judge David Agatstein, who thoroughly investigated and commented upon this issue, among other VTC issues. Judge Agatstein's report was accepted by the AALJ Board on February 2, 2001. Copies of my 2001 letter, Judge Agatstein's report, and the appendices to his report are attached for your reference and submitted as part of AALJ's response to the current request for comment on this issue.

The ALJs strongly support your determination that only the ALJs will make the decision whether to schedule a VTC hearing appearance by an expert witness, and that the claimants should not be empowered to veto the use of VTC to take expert witness testimony. We strongly support the deletion of the proposed amendments to 20 C.F.R. §§ 404.938, 416.1438 that would have given the claimants such a veto.

The many good reasons for not permitting the claimants to veto VTC testimony by expert witnesses are stated cogently in the comment and response on this issue in the Notice of Final Rulemaking at 68 F.R. 5215-5216, as well as in my 2001 letter, Judge Agatstein's report, and appendix II to his report that was prepared by the ALJs in the West Des Moines OHA. I briefly will restate the reasons here:

1. Due process fully is accorded to the claimant if (s)he can see, hear, and cross-examine the expert witness, and confront the expert with documentary evidence, all of which can be done by VTC. Both Medical Experts and Vocational Experts testify based upon evidence in the record, not personal examinations or evaluations of the claimant. The cross-examination of the

expert will be regarding the expert's qualifications and accuracy of the testimony. Therefore, physical proximity of the claimant and expert are not necessary.

2. To obtain expert witness testimony when it is impractical for the expert to appear in person is a primary purpose of VTC hearings. A claimant's veto of VTC expert testimony would defeat this purpose. It is not reasonable to expect physicians and vocational experts to spend the time and trouble to travel great distances to appear at hearings when there is technology that can make their appearances easy. The Iowa VTC test showed that many experts, particularly physicians, will decline to make such avoidable trips to remote sites and even some urban areas, when they know VTC is available. VTC permits the ALJs to obtain testimony from "super specialist" physicians who may be available at only a few facilities in the U.S. in those select cases in which such testimony is needed to understand a claimant's unusual impairment and limitations. A claimant's veto often would prevent needed expert testimony or relegate ALJs to obtaining the needed testimony through the ponderous and time consuming written interrogatories procedure. Thus, a claimant's veto would reduce the effectiveness of VTC in improving the hearing process.

3. A claimant's veto of VTC expert testimony would serve no purpose other than to facilitate "expert shopping" and permit a claimant to prevent the taking of potentially adverse expert testimony.

4. Determining what testimonial and documentary evidence should be part of the hearing record is the role of the ALJ, not the claimant. There is no due process enhancing reason to make the taking of VTC expert testimony the sole exception. A claimant has the right to object to expert testimony based upon the expert's qualifications or bias. Under the final regulations, a claimant may object to taking expert testimony by VTC, but the objection correctly cannot bar the VTC expert testimony, unless the ALJ finds that circumstances warrant an in person expert appearance, such as the need to address a claimant's allegation of personal bias or dishonesty. The final regulations are consistent with the agency's internal procedure of permitting a claimant to object to the use of interrogatories to obtain expert testimony, upon which an ALJ must rule. However, a claimant's objection does not require the non-use of interrogatories. HALLEX (Hearings, Appeals and Litigation Law Manual) I-2-530, I-2-542, I-2-557.

5. The practical benefits from VTC of the reduced cost of experts' appearances because of reduced travel costs and numbers of experts used, and the ability to efficiently schedule hearings with the same expert on the same day in several different locations, would be compromised by a claimant's veto of VTC expert testimony. If claimants can veto VTC expert testimony, several experts would be needed to go to the different locations. Thus, a claimant's veto would reduce the effectiveness of VTC in improving the hearing process by delaying the scheduling of hearings and raising travel and expert witness costs.

Please feel free to contact me if you require any further clarification or documentation for these comments. Thank you for your careful consideration of these important concerns.

Respectfully submitted,

Ronald G. Bernoski

Ronald G. Bernoski
President

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February 28, 2001

Ronald Bernoski,
President

Commissioner of Social Security
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RE: Statement of the Association of Administrative Law Judges in Response to the Notice of Proposed Rulemaking – Scheduling Video Teleconference Hearings Before Administrative Law Judges

Dear Commissioner:

The Association of Administrative Law Judges, I.F.P.T.E., A.F.L.-C.I.O. ("AALJ"), is (as you know) the exclusive bargaining representative of all the non-managerial administrative law judges in the Social Security Administration – a total of approximately 1,000 Judges. The judges are vitally interested in the agency's announced intention to expand the use of Video Teleconference ("VTC") Hearings, and submit this comment in response to the proposed regulatory changes published on January 5, 2001 (66 Federal Register 1059).

Because of the importance of this issue, I asked one of our Regional Vice Presidents (Judge David J. Agatstein, Region IX) to conduct a thorough investigation of the proposed regulations for consideration by the National Executive Board of the AALJ ("Board"). The Board accepted Judge Agatstein's report dated January 29, 2001 (annexed) on February 2, 2001. The report was widely circulated among interested Judges, and additional comments and recommendations were received. On February 16, 2001 the Board approved the following specific response to the Notice of Proposed Rulemaking:

Proposed rules 404.938 and 416.1438 state "We will schedule an in-person hearing for you if you tell us that you do not want a video teleconference hearing or do not want an expert witness to testify via video teleconference."

First. Under the Social Security Act and the Administrative Procedure Act, the administrative law judge has exclusive control over the manner in which hearings are conducted, so long as the hearing provides fundamental fairness and comports with the requirements of due process. This statutory responsibility necessarily includes authority to settle disputes concerning the appropriate form of hearing in a particular case. While

the proposed regulations, as drafted, acknowledge the administrative law judge's authority to change the time or place of an in person hearing, and to convert a VTC hearing to an in person hearing upon the claimant's demand (the regulations do not make clear the latest point in time at which the demand for an in person hearing must be made), the regulations do not expressly give effect to the Administrative Law Judge's statutory authority to determine whether a particular hearing will be conducted wholly or in part by video teleconference, when facilities for both VTC hearings and in person hearings are available. To conform the regulatory language to the underlying statutes, and to avoid confusion and litigation over this issue, the regulations should make clear that the administrative law judge may change, not only the time and place of hearing, but the form of the hearing as well. Accordingly, on behalf of the AALJ, I propose alternative regulations along the following lines:

"If video teleconferencing facilities are readily available to you, the administrative law judge may direct that your hearing be held in person, by video teleconference, or partly in person and partly by video teleconference. You may ask the administrative law judge to change your hearing, by giving the administrative law judge your reasons in writing, as explained in the notice of hearing. The administrative law judge may decide to have a video teleconference hearing if your impairment prevents you from traveling to our hearing office or you reside too far from the nearest hearing office and the administrative law judge finds that it would not be feasible to conduct your hearing in person. In deciding whether it is feasible to conduct your hearing in person, the administrative law judge will consider such things as the number of hearings to be held in the place you reside, the length of time it will take before other hearings in that place may be scheduled, the availability of transportation to the place where you reside, the travel time involved, and the number of claimants in other locations who are waiting for the administrative law judge to hear their cases"

No doubt, those skilled in drafting Social Security regulations will improve both the language used and the examples given in the foregoing proposed alternative regulation. However, the principle of allowing the administrative law judge to determine the most appropriate form of hearing in any given case is of paramount importance in preventing a miscarriage of justice.

Second. The proposal to allow the claimant to determine whether the expert will appear in person or by video conference hook up is unacceptable. Due process is fully accorded to the claimant if (s)he can see the expert, hear the expert, cross-examine the expert, and confront the expert with documentary evidence. This provision, if permitted to stand, will serve no purpose other than facilitating "expert shopping." It will defeat a primary purpose of video teleconference hearings: to obtain expert testimony when it is impractical for an expert to appear in person. Judges who have examined the proposed regulations have roundly criticized this provision. Additional reasons for rejecting the provision are contained in the annexed report and its appendices.

Please feel free to contact me if you require any further clarification or documentation for these comments. Thank you for your anticipated careful attention to these important concerns.

Respectfully submitted,

Ronald Bernoski

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DAVID J. AGATSTEIN
United States Administrative Law Judge

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January 29, 2001

Honorable Ronald Bernoski
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RE: Video Teleconferencing Hearings: Report and Recommendations

Dear Ron:

You asked me to evaluate the proposed Regulations entitled "Scheduling Video Teleconference Hearings Before Administrative Law Judges," 65 Federal Register 1059 (January 5, 2001) [I have not appended the ten page document; it is available at Federal Register Online]. Ordinarily, such evaluation would lead to an Association response to the Notice of Proposed Rulemaking, which response is due March 6, 2001. While it is important that we do respond to the NPRM, these Regulations, if adopted, will have a significant affect on the terms and conditions of the Judges' employment. Accordingly, it is critical that the AALJ demand to negotiate the impact and implementation of the Regulations – and that we do so in time to influence the regulatory language.

My evaluation of the proposed Regulations included an Information Request to SSA, direct communication with some of the Judges in the experimental video teleconferencing offices (Huntington, WVA, Albuquerque, NM, and West Des Moines IA) and independent research. By email and webpage postings, I invited all Judges (particularly AALJ members) to comment on this issue. Because of the short time frame, I have not yet received the agency's response to the Information Request. However, a significant number of Judges offered thoughtful comments.

Among the Judges surveyed, opinions ranged from total opposition to video teleconference hearings (generally, on grounds of due process and judicial decorum) through qualified opposition or support (often raising technological considerations and the novelty of the process) through enthusiastic acceptance. Not surprisingly, Judges who have had to travel long distances under adverse conditions to conduct hearings in remote hearing sites expressed the latter views. Those Judges also mentioned the difficulty of assembling claimants' attorneys, expert witnesses and interpreters – factors cited in the preamble to the Regulations themselves.

My own view is that video teleconference hearings should be an available option, to be used in the sole discretion of the ALJ to whom the case is assigned. The proposed Regulations avoid

granting that discretion to the ALJ in the first instance. Consistent with current [illegible] Baltimore, the Regulations imply that decisions concerning the place and manner in which hearings are conducted should be made by management, rather than by Judges – HPI Revisited. Obviously, we must strenuously oppose any Regulations that so encroach on our statutory responsibility as Judges.

Pros and Cons of Video Conferencing

Before turning to the specifics of the proposed Regulations let us carefully consider the objections of Judges who oppose the entire concept of video teleconferenced hearings. Judges who prefer that we all conduct hearings, with or without experts, in an Alaskan work camp, or at a remote penitentiary, are clearly motivated by principle, and must be heard. Moreover, should the AALJ decide that it is necessary or desirable to oppose the Regulations with full force, the arguments of the objectors may carry the day.

The arguments against video teleconference hearings fall into three overlapping categories: sociological (a term I prefer to "visceral"), technological and legal. The sociological argument is simply this: whenever possible, important business is conducted face to face. If I want to discuss complicated, sensitive, personal information with a clergyman, physician or lawyer whom I do not already know well, both of us will choose to meet in a private dignified setting. Unless absolutely necessary, the initial substantive conversation will not be conducted on the telephone. It certainly will not take place on closed circuit TV. The same considerations hold true for all participants in a judicial proceeding, particularly a Social Security disability hearing, in which the intimate details of a claimant's physical and mental impairments are discussed among strangers.

An additional factor in Social Security hearings is, of course, the Judge's obligation to assess the credibility of witnesses. As noted below, telephone conference call hearings have been used in some administrative hearings for many years, and video teleconferencing is becoming more common in administrative and judicial proceedings. There is a good deal of academic speculation about the effect of such technology on credibility assessment, we have anecdotal assessments by participants in these proceedings (See, e.g., Demeanor Credibility, 49 Cath. U.L. Rev. 903 [Summer, 2000] by James P. Timony, CALJ of the Federal Trade Commission), and there are numerous cases in which the credibility of telephonic evidence is discussed. However, there is really no valid and reliable study of the issue. As we all know, the accuracy of credibility determinations is extremely difficult to evaluate in the best of real life situations. (Agatstein, A Search for the Truth: Credibility of Claimants' Allegations, Proceedings of 2000 AALJ Conference, 67 et seq.) I conclude that credibility is an argument that can be raised in this context, but the argument cannot be proven either way. I mention, without further comment, the possible effect of video conferencing in strengthening the law against "sit and squirm jurisprudence."

A final point, from the sociological perspective, is that any new procedure works better after everyone gets used to it. Even after adjustment, however, there will be an obvious difference between live and video conference hearings. The choice involves tradeoffs. Since I work in Pasadena, I would ask the question this way: "Is it preferable to watch the Rose Parade in person or on television?" Most years, I would rather stay home; zealots bring portable TVs to the parade. Again, as with video conferencing, the choice is personal and voluntary, and it depends upon the

circumstances. Video conferencing should be an available tool [illegible] Judge) "so long as claimant, his or her attorney AND the judge *all* agree". (emph in original)

No one proposes that we publicly televise ALJ hearings; Courtroom Circus arguments are misplaced. However, there is a lesson to be learned from the courtroom experiment with O.J. Simpson's glove. Simply stated, the technology works better if everyone wants it to work -- and vice-versa.

Although very high quality video teleconferencing technology is readily available, one Judge reports that the equipment used in the Albuquerque experiment was purchased at "Uncle Sam's Junk Shop". The problem for the AALJ if we proceed with video teleconferencing, is to make certain (a) that we have good equipment in the first instance, (b) that we have well-funded long term contracts for up grading the equipment, (c) that we have and keep well trained staff to maintain and run the equipment and (d) we have control over the location of the equipment. We must anticipate serious problems in the event of some future budgetary short fall; specifically, we must make certain that no one can propose the video conference equivalent of "one man hearings" or any similar nonsense. Finally, sophisticated portable video conference equipment, if we ever acquire it, will strengthen the AALJ's case for Judicial "flexiplace."

The legal arguments are not trivial. Obviously, there are no cases directly on point, but in United States v. Baker, 45 F.3d 837, cert. den. 516 U.S. 871, the Fourth Circuit held that the use of video conferencing to conduct civil commitment hearings during a pilot program in the North Carolina federal district court did not violate the inmate's right of due process or confrontation. During the hearing, Baker, who was apparently affected with schizophrenia, remained in his place of incarceration; he was in contact with the government attorney and district judge only by the use of video cameras, microphones and televisions. In reaching the conclusion that the procedure did not deprive Baker of due process, the Court of Appeals quoted and applied the test of Mathews v. Eldridge, 424 U.S. 319 (1976), which is, of course, a leading case in Social Security disability law as well. The Mathews test, as stated in Baker, is:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, or additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural or substitute procedural requirements would entail."

Judge Widener dissented from the opinion in Baker. One commentator is also critical of the Court's application of Mathews to the facts of this case. Stodghill, The Maryland Survey 1994-1995, 55 Md. L. Rev. 1001 (1996). A contrary result in a distinguishable case was reached in United States v. Frierson, 208 F.3d 282 (C.A.1. (Mass) 2000).

Any legal attack on video conferencing will, of course, aim to skewer management on the additional prongs of Judicial Independence (citing the Social Security Act, the Administrative Procedure Act, and the usual authorities and glosses) and Union Rights (citing the Federal Service Labor-Management Relations Statute and related laws). Before launching an attack, however, it will be necessary to consider the relatively long and relatively successful history of telephone conference call hearings in state administrative and judicial proceedings. The newer video technology has been used in a wide variety of proceedings, including (among many others)

disability hearings conducted by various state and federal agencies. The Bankruptcy Court was an early pioneer, and the federal District Courts have now weighed in (e.g., Baker). The experience of these tribunals has been described in numerous law review articles, some of which are cited in Appendix I. And, of course, we now have the results of the experimental project in OHA, which we will next consider.

The OHA Experiment

As stated in the preamble to the proposed regulations:

"All three sites [Huntington, Albuquerque, and West Des Moines] had some equipment problems, particularly at the beginning of the tests. ... [Some] representatives advised their clients not to elect a video teleconference hearing based on their initial experiences, especially in the Albuquerque-El Paso and Huntington-Prestonburg tests. In those two tests, [because the claimant still had to travel to the same] remote hearing location to which he or she would have had to travel for an in person hearing, there was no travel benefit to the individual. Because participation rates at Huntington-Prestonburg and Albuquerque-El Paso were low we have not attempted to draw inferences about customer service from these tests."

Comments from Judges in the field confirmed this general assessment of the situation in Albuquerque and Huntington. Some of the problems may be attributed to faulty test design; others, such as the problem of un-represented claimants, may be more fundamental. One Judge stated:

"The experience in Albuquerque was singularly unsuccessful. ... Our problems with video conferencing were reliability [equipment failure]. ... One does not get the feeling of an actual hearing. Many of the subjective elements that tip you off to something are missing. If I were a rep, I would never agree to a video hearing. ... Then there is the problem of exhibits submitted at hearing. We kept the fax machine humming."

One Judge in Region III put it this way: "The Judges here are not in favor of hearings via video teleconference. ... It has been my personal experience with video teleconference hearings that it is, essentially, watching two people (the claimant and representative) talk to each other on television."

On the other hand, the preamble states:

"Our experience was very different in Iowa, where we were not limited to using an established remote hearing location but had the benefit of the wide-ranging ICN [Iowa Communications Network -- 'a statewide network that places video teleconferencing facilities within about 20 miles of most Iowa residents']". ... "The participation rate for the Iowa test was over 40 percent" SSA surveyed the participants. A "large percentage" [sic -- no details are given in the preamble] rated the VTC hearings as "convenient" or "very convenient" and over all service as either "good" or "very good" ... "Based on all these factors -- customer satisfaction, ability to provide more timely hearings [no details in the preamble], savings in ALJ travel time, faster case processing [cases need not be accumulated to make up a travel docket] and higher ratio of hearings held to hearings scheduled [why is that?] -- we decided that conducting hearings by VTC is an efficient service delivery alternative. We also decided that scheduling a VTC hearing,

would permit us to provide faster access to a hearing for some individuals." (emph. added)

The Judges in Iowa confirm this favorable assessment:

"As you probably already know, we (the ALJs) in WDM have been holding video hearings for a number of years, well over a thousand so far. All of the ALJs in the office are participating ... Over the years, we have found that the video hearings are a great alternative to traveling to remote sites for hearings. The video program has helped to dramatically reduce our travel time, cut the traveling costs of the ALJs, expert witnesses, hearing reporters and claimants, and lowered the number of postponed hearings because of weather and travel difficulties. We are able to utilize expert witnesses by video that would not be available at remote travel sites. Most importantly, the claimants and representatives have been very pleased with the process which has also cut their travel times, has helped expedite hearings and helps to give them a more even flow of hearings than used to occur when they would have a rush of cases when an ALJ visited the remote site. No one has ever complained that they believed that there was any denial of due process with the video hearings, which are nothing like a telephone hearing. In Iowa there are a number of federal and state courts that are using video hearings, as well as state (DDS, Parole Boards) and federal agencies (including INS)."

Of course, not everyone lives in Iowa (for obvious reasons, very few people live in Iowa) and not every state has, or needs, a wide-ranging communications network. As another Judge stated:

"I think this technology has been successfully used in the West Des Moines Hearing Office. I think it is most useful in our western offices where distances are great, populations are scattered, and winter weather is a significant problem. In a small office like Macon, we only have one remote hearing site. It is in Albany, Georgia. The surrounding area is completely rural and the average claimant reads at a grade school level or less. Many claimants are not represented by counsel and lack transportation. In these circumstances I do not think we will have much luck using this technology. I believe that this technology is expensive and each hearing office should look at their caseloads, claimant population, and make a cost/benefit analysis. This is a decision that needs to be based on the individual circumstance of a hearing office and its service area. It should not be imposed from the top, local conditions being ignored, to satisfy the unending appetite of management to impose technology without consulting those who actually do the work."

To which we might add: not in Macon, and not in Manhattan either.

In short, while a number of Judges and commentators express legitimate skepticism about video conference hearings, it is difficult to escape the conclusion that courtroom teleconferencing, under certain circumstances, is the wave of the future. Whether the future has arrived is another question.

The Proposed Regulations

The proposed regulations may be found at Federal Register Online, [wais.access.gpo.gov, DOCID:fr05ja01-22]. Some of the language is contained in the existing regulations; I have considered, but do not find it necessary to address those comments aimed at regulations already in force. Nor have I attempted to summarize in this report all of the many thoughtful observations of the Judges who responded.

Judges who are [illegible]

the proposed regulations. I strongly agree with Point I. If that cannot be achieved, I endorse Point II with equal vigor:

Point I: As one Judge succinctly put it: "Proposed 404.936 states that 'We may schedule' a video hearing. I think it should read that the ALJ may direct that a video hearing be scheduled. The ALJ should have the right to decide if a video hearing is appropriate. If I try some video hearings, and feel they are an unacceptable method, then I should be able to refuse to do them, and to insist on live hearings." Conversely, the ALJ should have the power to order a video conference hearing in appropriate circumstances. The proposed regulations state that the ALJ may change "the site and/or time of your scheduled video conference hearing and the time and/or place of your scheduled in-person hearing" for specified reasons, but do not expressly authorize the ALJ, in the exercise of general discretion, to change from one form of hearing to another. Proposed rule 416.1436 contains the same objectionable language.

One office dissents from Point I, on the grounds that it will lead to "arbitrary and non-uniform use of the process." However, I trust that the Judges will not behave arbitrarily, but will use sound discretion, and, as suggested above, most commentators agree that agency-imposed "uniformity" in this area is precisely what we want to avoid.

Point II: Proposed rule 404.938 and 416.1438 state: "We will schedule an in-person hearing for you if you tell us that you do not want a video teleconference hearing or do not want an expert witness to testify via video teleconference." There is absolutely no justification for allowing the claimant to determine whether the expert will appear in person or by video conference hook up, so long as the claimant can see the witness, hear the witness, cross-examine the witness, and confront the witness with documentary evidence. This provision will serve no purpose other than to facilitate "expert shopping". The objection is developed at greater length in a proposed response to the NPRM prepared by the Judges in West Des Moines. (Appendix II)

Many commentators state that the claimant should have a right to appear before the Judge personally, as the proposed regulations contemplate. I (and a few other Judges who have expressly considered the ramifications of this point) respectfully disagree. I believe the Judge should have a right to order a video conference hearing if (for example) the claimant is incarcerated, and video conferencing facilities are available in the prison. While the proposed regulations may, of course, be changed in the future, I believe it is the responsibility of the AALJ to seek the broadest possible discretion for each individual Judge. I urge the adoption of plenary discretion, as set forth in Point I.

1. The AALJ should submit a response to the notice of propose rule making, reiterating Points I and II, supra.
2. The AALJ should demand to negotiate the impact and implementation of the proposed regulations.

Respectfully Submitted,

David J. Agatstein,
AALJ Director,
Region IX

CC Board and Members, AALJ

Appendix I

See e.g., Telephone Hearings in Florida, 38 U. Miami L. Rev. 593 (1984), Telephone Conferencing in Criminal Court Cases, 38 U. Miami L. Rev. 611 (1984); Comment, Inmates' Civil Rights Cases and the Federal Courts, 28 Creighton L. Rev. 1255 (June, 1995); and Farrell, Scientific and Technological Evidence, 43 Emory L.J. 927 (Summer, 1994), discussing (at fn 53) welfare, unemployment compensation, and state disability hearings.

State courts have also experimented with video conferencing. See, e.g., Perritt, Changing Litigation with Science and Technology, 43 Emory L.J. 1071 (Summer, 1994), discussing the Virginia experience, and Lederer, ibid. at 1095. (Judges who attended the AALJ Conference in Williamsburg know that Fred Lederer is the director of William & Mary's Courtroom 21, "the world's most technologically advanced courtroom").

A LEXIS search reveals four recent decisions by the Court of Appeals for Veterans Affairs in which the initial disability hearing was conducted by video conference. (Nos. 98-2475, 99-2054, 99-197, and 99-258). Not in Macon but perhaps in Mekong?

Closer to home, conference calls and videoconferences are authorized for second-level grievance review procedures under Medicare. Gladieux, Medicare+Choice Appeals Procedures: Reconciling Due Process Rights and Cost Containment, 25 Am. J. L. and Med. 61 (1999); Kinney, Tapping and Resolving Consumer Concerns About Health Care, 26 Am. J. L. and Med. 335 (2000). In 1983 (i.e., long before Baker), the D.C. Circuit held that the telephone hearings provided by HHS satisfied due process requirements for all claims except those involving the credibility or veracity of the claimant. Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983).

Regarding the Bankruptcy Court, see Pearce, Symposium: Law Day 2050, 27 Fla. St. U. L. Rev. 9 (Fall, 1999), citing (fn 25) Hamblett, Video Bridges Two Countries in Live Bankruptcy Hearing, N.Y.L.J., June 7, 1999, at 1 ("describing 'the first videoconference hearing between a bankruptcy judge in the United States and one in a foreign country'"); Berman, You are (Virtually) There: The Future of Technology in the Bankruptcy System, 1995 American Bankruptcy Institute Journal 166.

The use of video taped depositions is "widely accepted" in federal trial courts. (Perritt, op cit.)

Appendix II

As regards proposed regulation 404.936 (a) and 404.938(b) we are strongly in favor of having the authority to schedule hearings by videoconference ab initio with the claimant having the right to right to object and request an in person hearing. Since the beginning of our video hearing project we were limited to the video hearing election method in which we had to send a video election form to the claimants and then rely on them to return the signed form before we could schedule a video hearing. Someone would then have to correlate the returned forms with the cases. The whole process results in an unnecessary waste of staff time and resources. Over the course of thousands of hearings we have found that the claimants and representatives have had almost no problem with either the technical or procedural aspects of the video hearings, even those claimants that attended the hearing without a representative. Despite the good response rate to the video election forms (up to 50%), it has been clear to the ALJs and the office staff that most of the remaining 50% are amenable to video hearings once the availability is brought to their attention and the process briefly explained. There have been many occasions where remote site in person hearings are scheduled because the claimant did not return the election form, but on the day of the hearing it must be continued for some reason, such as the claimant wants to get representation, weather or car problems, etc. When claimants are told of the possibility of holding the rescheduled hearing by video, they welcome the idea and make it clear that they had not read any of the material sent to them and thus had not returned the election form.
By allowing OHA to schedule the hearing by video without first having to get the election forms sent and hopefully returned, hearings for claimants will be expedited, the claimant may be able to reduce their travel time and expense by going to a closer remote video site, and may avoid the need to travel to a site where in person hearings are held which the claimant may consider to be a busier and more difficult 'urban' site.

As regards proposed 20 CFR 404.936(d). There is no question that we support the claimant's right to reject a video hearing and request an in person hearing. However, since the claimant has an unqualified right to have an in person hearing we do not see the need for the wording in 404.938(b) that states 'We will schedule an in-person hearing for you if.....or do not want an expert witness to testify via a video conference". There appears to be no purpose to adding a specific reason if the claimant can "tell us they do not want a video hearing" without having to provide a reason in the first part of that sentence. We are concerned that the addition of the statement about an expert witness testifying by video teleconference will cause confusion and could lead to spurious appeals by representatives who are dissatisfied with the expert testimony after the video hearing is held.

There are many practical and legal reasons why we have relied upon the presence of the expert witnesses at the originating video site (i.e. the hearing office) rather than at the remote site. We utilize about 100 of the available video sites in the state of Iowa so that we can schedule cases as close to the claimant's home as possible. While they are located close to the claimant's residence they are spread throughout the state. In order to efficiently utilize the services of vocational experts we need to be able to provide them with a docket of several cases each day. Payment to the expert is higher for the first hearing of the day than for the subsequent hearings that day. While we try to schedule as many video hearings from the same remote site as possible each day, we often have to utilize several remote sites on the same day. If the expert is present at the hearing office they are able to cover all the hearings no matter how distant the remote sites are from one another. Otherwise we might have to have a number of experts attending hearings at various sites throughout the day. For example, a typical video docket may include hearings with claimants in Davenport, Fort Dodge, Sioux City and Ottumwa on the same day. If the expert is testifying from the hearing office, he or she can be present for all 4 hearings. This makes scheduling easier and the cost of the testimony less. Otherwise we would need 4 experts to be

available for 4 separate locations each doing only one hearing at odd times of the workday with all 4 hearings being paid at the full contract rate. The arrangements and the paperwork to schedule them in separate locations would be burdensome and cause a major delay in scheduling. Moreover, it would be almost impossible to have that many experts available to testify, to persuade them to travel to a remote site for only 1 hearing or to convince them there would be no security risk to them if they were alone at a remote site with a claimant. An expert who is located at a remote site will also be unable to utilize the reference material available in the hearing office, nor would they be able to review upcoming cases in the hearing office while they are waiting for the hearing to begin at the remote site.

This problem with vocational experts (i.e. availability, scheduling and cost) is compounded by many magnitudes when it comes to medical experts. It is almost impossible to get medical experts to testify at the larger urban areas where the hearing offices are located. It is indeed impossible to get them to appear at remote sites. Presently our hearing office has to rely on the services of a psychiatrist who flies to Des Moines from Wisconsin. To make it financially possible for him to do so, we must be able to utilize his services in several cases that day, thus even at the hearing office site we often have to delay some cases until he is available. He would not travel to the remote sites for the cases that he is able to testify in via the videoconference in Des Moines. It is only with the use of videoconferences that we are able to provide expert medical testimony to claimants at remote sites. In addition, even in some cases held in West Des Moines, we have to rely on testimony from medical expert located in Ames and Iowa City, Iowa via the videoconference from those university medical centers.

In addition to the procedural, security and cost problems listed above, there are legal problems that arise with having the expert witnesses located alone at the remote site with a claimant and/or a representative. When the expert is present at the same hearing location as the ALJ or OHA personnel, the ALJ can monitor statements made by the expert or the representative/claimant before or after the hearing and be sure they are included in the record. There would be no way to monitor ex parte communications between them at the remote site. Expert medical witnesses are not allowed to perform examinations of the claimants and it would be difficult to monitor that prohibition at a remote site if no SSA personnel are present.

Thus for the above reasons we believe that the wording in 20 CFR 404.936(d) as regards the objection to the use of a medical expert via the teleconference system should be deleted from the proposed regulation to avoid confusion or further complication of a scheduling system that is already quite cumbersome. If it is deemed absolutely necessary to give the claimant the right to object to having an expert witness testify at a video hearing, whether it is one held between a hearing office and a remote site or one where the hearing is in person with the expert testifying at a remote video site, such wording in the regulation should be separated from the wording about objecting to the video hearing per se, and should require that the claimant provide a good reason for the objection. Frankly, we have been unable to come up with a legitimate reason that would make sense for wanting a medical expert testifying at the remote site as opposed to the office hearing site. The claimant under the present regulations always has a right to object to the testimony of the expert because they object to the expert's qualifications or possible bias. We can not see any reason to provide a basis for an objection beyond those already in the record. We are concerned that the objection will be used by certain representatives to "expert shop" by objecting to the video testimony of certain medical or vocational experts that they feel may not support their claims. That would have a chilling effect on the testimony of the experts and a devastating effect on our ability to contract with needed experts, which are already very difficult to obtain. As stated above, it would be essentially impossible to get many of the experts, particularly the medical experts, to travel to most of the remote sites. If the claimants were allowed a blanket objection to the video appearance of expert witnesses, we would be left in a position where expert testimony would be unavailable in most cases, both those cases where the claimant and expert testify by video and those hearings where the expert can only appear by video.

The alternative is the extremely time consuming and unwieldy process of written [illegible] require multiple revisions of the questions, proffers to the claimants for review and comment, mailing and processing delays and recontacts with the expert when the written responses are unclear or contradictory, setting of another round of proffers and additional questions.